RECENT CASES

CONTRACTS—OUSTING JURISDICTION OF COURTS—VALIDITY.—GITLER ET AL. V. RUSSIA CO. ET AL., 106 N. Y. SUPP. 886.—*Held,* that a stipulation in a contract between a foreign corporation and a resident of New York State by which it was agreed not to sue in the New York courts was invalid as an attempt to oust the jurisdiction of the courts.

Stipulations in contracts made by persons domiciled in the same State limiting the venue to a certain county have been held invalid as against public policy and tending to oust courts of their jurisdiction; *Nute v. Hamilton Mutual Ins. Co.,* 6 Gray (Mass.) 174; *Boynton v. Middlesex Mutual Fire Ins. Co.,* 4 Met. (Mass.) 212; *Healy v. Building Loan Asso.,* 17 Penn. Sup. Ct. 385; but in *Greve v. Aetna Live Stock Ins. Co.,* 81 Hunter (N. Y.) 28, such a stipulation was held valid and binding and the court said that the theory that it was against public policy and an attempt to oust the jurisdiction of the courts was not worthy of extended notice. This was followed in *Heslin v. Eastern Building & Loan Asso.,* 28 Misc. (N. Y.) 376, but the former view appears to have the weight of authority. As to ousting the jurisdiction of different state courts a stipulation between persons domiciled in different states of the Union limiting the venue to one state was held void; *Reichard v. Manhattan Life Ins. Co.,* 31 Mo. 518; agreements not to resort to the Federal Courts have been held invalid; *Doyle v. Cont. Ins. Co.,* 94 U. S. 535; *Mutual R. F. Life Asso. v. Cleveland Woolen Mills,* 82 Fed. Rep. 508. But where both parties to a contract were domiciled in Italy a stipulation that all disputes arising on the contract should be referred to the Florentine courts in Italy, although the contract was to be performed in the United States and Canada, was held valid and binding, the court holding there was nothing unreasonable or contrary to public policy in such a stipulation when the vast number of jurisdictions through which they must pass in performing the contracts are considered; *Mittenthal v. Mascagni,* 183 Mass. 19.

DAMAGES—INFANTS—PERSONAL INJURY—LOSS OF TIME.—HAMMER V. CAINE, 92 PAC. (WASH.) 441.—*Held,* in a personal injury action by a minor by his mother as guardian *ad litem,* he may recover for loss of time and earnings during his minority, since the prosecution of the action by his mother as guardian *ad litem* estops her from subsequently making any claim against defendant therefor.

The services of a minor belong to the parent, *Cooley on Torts,* Section 135, who alone has a right of action for the loss of minor's services, *Wilder v. Great Western Cereal Co.,* 109 N. W. (Iowa) 789; but the infant may sue by guardian *ad litem* for loss of services after majority, *Ceigler v. Hopper-Morgan Co.,* 85 N. Y. Supp. 656, and for a permanent or deforming injury, *Statter v. Chicago & A. R. Co.,* 200 Mo. 107. Moreover, the infant himself acquires a right of action for his services during minority when emancipated by his father's abandonment of him, *Southern R. Co. v. Flemister,* 120 Ga. 524. So when the parent prosecutes the infant's suit he is presumed to waive

his own rights in favor of the infant. *Chesapeake & O. R. Co. v. Davis,* 22 Ky. Law Rep. 1156. *Contra, Texas & P. Ry. Co. v. Morin,* 66 Tex. 225. This presumption is rebutted by proof of a different intention, as by showing that the parent was simultaneously conducting his own action. *Slaughter v. Nashville, C. & St. L. Ry. Co.,* 28 Ky. Law. Rep. 665.

INJUNCTION—GROUNDS—UNLAWFUL INTERFERENCE WITH ANOTHER'S BUSINESS.—ROCKY MOUNTAIN BELL TELEPHONE CO. V. MONTANA FEDERATION OF LABOR, 156 FED. 809. During a strike a labor union issued circulars which described a company as "unfair" and a "legalized highwayman," urged people not to enter its employ or to patronize it, and stated that union members had decided to withdraw their trade from merchants who used the company's telephones. *Held,* that the commission of such acts by a labor union constituted unlawful conspiracy to interfere with the business of another, and would be enjoined.

Capital or labor can form combinations for the mutual benefit of members, provided force, threats, or intimidation are not used to effect such purposes. *Reynolds v. Everett,* 144 N. Y. 189; *Vegelahn v. Guntner,* 167 Mass. 92. But in some cases peaceable persuasion can be distinguished from coercion only with great difficulty. Thus a merchants' association can withdraw its trade from a wholesaler to compel him to stop dealing with outsiders. *Montgomery, Ward & Co. v. South Dakota, etc., Association,* 150 Fed. 413. But a union cannot strike to gain exclusive control of a trade. *Pickett v. Walsh,* 192 Mass. 572; *Erdman v. Mitchell,* 207 Pa. St. 79; *O'Brien v. People,* 216 Ill. 354. *Contra, National Protective Association, etc., v. Cumming,* 170 N. Y. 315. The threats or intimidation, however, need not be express, or even implied, but may be inferred from the attitude of the defendants. *Foster v. Clerks, etc., Association,* 78 N. Y. Supp. 860. In accordance with these general rules it has been held that strikers may uphold their cause in circulars or newspapers unless such action amounts to coercion. *Beck v. Ry. Teamsters', etc., Union,* 119 Mich. 497; *Casey v. Cincinnati Typ. Union,* 45 Fed. 135. In England numerous statutes have been passed regulating the activities of labor unions. *Lyons v. Wilkins,* 1 Ch. [1896] 811.

JURY—COMPETENCY OF JURORS—RELATIONSHIP TO PARTY INTERESTED.—LANSOUVER V. GLENBYON DYE WORKS, 68 ATL. (R. I.) 545.—*Held,* that an employee of a stockholder of a corporation is not by reason of his employment disqualified as a juror in a case to which the corporation is a party.

This case has no precedent in the United States, but the same question was decided in the same way in *Frederickton Boom Co. v. McPherson,* 13 N. Bruns. 8. Several business relations existing between a juror and a party to the suit conclusively disqualify the juror. For example, the relation of employer and employee. *Louisville, etc., R. Co. v. Mask,* 64 Miss. 738. The employer may be a corporation. *Burnett v. Burlington, etc., R. Co.,* 16 Neb. 332. The relation of landlord and tenant makes a juror incompetent. *Hathaway v. Helmer,* 25 Barb. (N. Y.) 29. *Arnold v. Producers' Fruit Co.,* 141 Cal. 738, *contra.* Other disqualifying relations are that of master and servant; *State v. Cella,* 3 Wash. 99; and that of partnership; *Stumm v. Hummell,* 39 Iowa, 478. A party's attorney or client is incompetent; 3 *Bl. Comm.* 363; but not the client of an attorney in the suit. *McCorkle v. Mallory,* 30 Wash. 632. Other business relations do not conclusively disqualify, but may

be judged likely or unlikely to influence the verdict. Thus, one who manufactured articles for a company with which a party was connected was held to be incompetent as a juror. *Laidlaw v. Sage,* 37 N. Y. Supp. 770. But the mere relation of debtor and creditor between a party and a juror does not disqualify the juror. *Thompson v. Douglass,* 35 W. Va. 337.

JURY—RIGHT TO JURY TRIAL—WAIVER OF JURY.—JENNINGS V. STATE, 114 N. W. 492 (WIS.)—*Held,* one pleading not guilty to an information charging felony or misdemeanor cannot, in the absence of a statute conferring the right, waive a jury, nor waive a right to trial by a common-law jury of twelve jurors. Marshall, J., *dissenting.*

At common law a jury was an essential part of any court which had jurisdiction to try persons charged by indictment and could not be waived. *Paulsen v. People,* 195 Ill. 507. While in civil cases the right to a jury trial is a mere privilege for the benefit of the litigants which may be waived, *Baird v. Mayor,* 74 N. Y. 382, in criminal cases the court is without jurisdiction in the absence of a jury, and jurisdiction cannot be conferred by consent. *State v. Maine,* 27 Conn. 281. In some States the rule does not apply to trials for misdemeanors. *State v. Alderton,* 50 W. Va. 101; *Levi v. State,* 4 Baxt. (Tenn.) 289. Consistently, when the jury trial cannot be waived it has been held that the common-law number of jurors cannot be waived. *Cancemi v. People,* 18 N. Y. 128; *State v. Mansfield,* 41 Mo. 470. *Contra, State v. Kaufman,* 51 Ia. 578; *Com. v. Dailey,* 12 Cush. (Mass.) 80. Some States by statute confer the right to waive. Such statutes have been held not in conflict with the State constitutions, *People v. Noll,* 20 Cal. 164; *State v. Abbee,* 61 N. H. 42; or with the Constitution of the United States, *Hallinger v. Davis,* 146 U. S. 314.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—CRAWFORD & MCCRIMMON CO. V. GOSE, 82 N. E. 984 (IND.).—*Held,* that in an action against an employer for injuries to an employee, the burden of proving contributory negligence rests on the employer.

In some jurisdictions the rule seems to be well settled that the burden is on the plaintiff to show by a preponderance of evidence that he was free from contributory negligence, *Connolly v. Waltham,* 156 Mass. 368, including ignorance of defects causing the injury, *Wiggins Ferry Co. v. Hill,* 112 Ill. App. 475; *Belair v. Chicago, etc., R. Co.,* 43 Iowa, 662; even when the action is brought under an employer's liability statute with no provisions on this particular point. *Taylor v. Carew Mfg. Co.,* 143 Mass. 470. Where all the circumstances attending the accident are in evidence, fair inference will take the place of positive evidence of plaintiff's due care. *Tyndale v. Old Colony R. Co.,* 156 Mass. 503; *Vorhees v. Hudson River Tel. Co.,* 109 N. Y. App. Div. 465. Still other jurisdictions hold that if the plaintiff proves the master negligent, he thus throws upon the defendant master the burden of showing contributory negligence. *Godfrey v. Beattyville Coal Co.,* 101 Ky. 339; *Johnston v. Richmond, etc., R. Co.,* 95 Ia. 685. But in the majority of the states contributory negligence is regarded as an affirmative defense which must be proved by the defendant. *Bonn v. Galveston, etc., R. Co.,* 82 S. W. 808 (Tex.); *Boweing v. Wilmington Malleable Iron Co.,* 66 Atl. 369 (Del.); *Northern Pac. R. Co. v. Tynan,* 119 Fed. 288; *Stewart v. Raleigh & A. Air Line R. Co.,* 53 S. E. 877, (N. C.). On the other hand, where contributory

negligence may be legitimately inferred from the plaintiff's own showing, defendant need not prove it. *New Omaha Thompson-Houston Electric Light Co. v. Dent,* 68 Neb. 668.

MASTER AND SERVANT—MASTER'S NEGLECT OF STATUTORY DUTY—EFFECT ON SERVANT'S ASSUMPTION OF RISK.—UNITED STATES CEMENT CO. V. COOPER, 82 N. E. 981 (IND.).—*Held,* that the doctrine of assumed risk does not apply where the negligence consists in violating the factory act (*Burns' Ann. St.* 1901, Section 7087), providing that machinery shall be guarded.

There is some conflict of authority as to whether a master may avail himself of the defense of assumption of risk where the injury complained of resulted from his neglect of a duty imposed by statute. Where the defense is forbidden by the statute itself, he cannot of course rely upon it, *Southern R. Co. v. Carson,* 194 U. S. 136, and where there is no such inhibition the weight of authority seems to be to the same effect, *Murphy v. Grand Rapids Veneer Works,* 106 N. W. 211 (Mich.); *Quackenbush v. Wisconsin, etc., R. Co.,* 62 Wisc. 411; *Denver & R. G. R. Co. v. Norgate,* 72 C. C. A. 365; even though the servant knew of the violation of the statute. The extreme case in this direction declares that assumption of risk would nullify the statute. *Narramore v. Cleveland, etc., R. Co.,* 96 Fed. 298. The contrary doctrine holds that knowledge of the violation of the statute constitutes a waiver of its terms and an assumption of risk. *Sweeney v. Central Pac. R. Co.,* 57 Cal. 15; *Spiva v. Osage Coal & Mining Co.,* 88 Mo. 68; *Kiernan v. Eidlitz,* 100 N. Y. Supp. 731. Between these extremes there are several cases holding that risk through the statutory negligence of the master is only assumed when the danger is so great that the facing of it amounts to contributory negligence. *Biles v. Seaboard Air Line R. Co.,* 139 N. C. 528; *Bair v. Heibel,* 103 Mo. App. 621. It is a settled rule, however, that if the object of the statute is other than the protection of the servant, *Fleming v. St. Paul, etc., R. Co.,* 27 Minn. 111, or if it is merely penal, *Knisley v. Pratt,* 148 N. Y. 372; *Nottage v. Sawmill Phœnix,* 133 Fed. 979, the master's neglect of the duty imposed will not prevent his relying on the servant's assumption of risk.

RAILROADS—CROSSING ACCIDENT—PROXIMATE CAUSE.—LOUISVILLE & N. R. CO. V. ARMSTRONG, 105 S. W. 473 (KY.).—*Held,* that where a team was frightened by the carcass of a horse lying on the defendant's right of way, near a road, the killing of the horse by one of the defendant's trains was not the proximate cause of the plaintiff's injuries resulting from the fright of the team.

In *Behling v. S. W. Penn. Pipe Lines,* 160 Pa. St. 359, a proximate cause is defined as one which in natural sequence, undisturbed by any independent cause, produces the result complained of. The negligent and unlawful leaving of any obstruction on or near the right of way and within the highway, although without the traveled portion, in such a manner as to frighten teams of ordinary docility, will make the company liable for damages resulting from such fright. *Pittsburgh, C. & St. L. R. Co. v. Kitley,* 118 Ind. 152; *Jones v. Housatonic R. Co.,* 107 Mass. 261; *Harrell v. Albemarle & P. R. R. Co.,* 110 N. C. 215; *Palys v. Jewett,* 32 N. J. Eq. 302. But, to recover, the *onus* of proving the negligence of the defendant rests upon the plaintiff. *Indianapolis & St. L. Ry. Co. v. Evans,* 88 Ill. 63. And he must show that the defendant knew, or by the use of ordinary care could have known, of the

presence of such obstruction on its right of way in time to have removed it before the plaintiff was injured. *Baxter v. Chicago, R. I. & P. Ry. Co.*, 87 Ia. 488. But the negligence of the defendant is not the proximate cause and in no way contributed to the accident, but was merely concurrent with it. *Selleck v. Lake Shore, etc., Ry. Co.*, 58 Mich. 195; *Bosko v. Delaware, L. & W. R. Co.*, 36 N. Y. Supp. 261.

RAILROADS—DUTY TO LOOK AND LISTEN—SIGNAL FROM FLAGMAN.—UNION PACIFIC R. Co. v. ROSEWATER, 157 FED. 168.—*Held*, that the placing of gates or the stationing of flagmen at railroad crossings in a city is not a duty imposed by statute or municipal ordinance on railroad companies, or voluntarily assumed by them, for the purpose of relieving the traveler on the street from taking those precautions for his own safety required by the long-settled rule of law, but as an additional precaution to meet the increased peril resulting from local conditions in cities; and open gates, or a signal from a flagman to cross, does not relieve a traveler from the duty to look and listen before entering upon the tracks.

A failure to stop, look, and listen before crossing an unguarded railway track is evidence of negligence. *Schofield v. Chicago, etc., Ry. Co.*, 114 U. S. 615. And according to the Pennsylvania rule it is negligence *per se* which will bar recovery, unless it affirmatvely appears that it did not approximately contribute to the injury. *Penna. R. Co. v. Beale*, 73 Pa. St. 504; *Philadelphia, etc., R. Co. v. Hogeland*, 66 Md. 149. But where the guard stationed at the crossing directs the traveler to cross, in no jurisdiction is the failure to stop, look, and listen, negligence as a matter of law. It is a question of fact for the jury. *Conaty v. New York, etc., R. Co.*, 164 Mass. 572; *Kane v. Railroad*, 132 N. Y. 160. And in Ohio the Supreme Court of the State has taken a more emphatic position by declaring that an open gate, with the gateman in charge, is notice of a clear track and safe crossing; and it is not negligence to pass upon the tracks without stopping to listen. *Railroad v. Schneider*, 45 Ohio St. 678.

TORT—NEGLIGENCE—LIABILITY—INTEREST IN PLACE.—HOLLIS V. KANSAS CITY MO. RETAIL MERCHANT'S ASS'N ET AL., 103 S. W. (Mo.) 32. Where an association gave a street fair in which an amusement company furnished their appliances for amusements, including gondolas, similar to a merry-go-round, under a contract by which the fees for riding on the gondolas collected by the company were divided between the association and the company, and where the association had general charge of all the grounds and took an active part in distributing advertisements of the amusements, *held*, that the association, as well as the company, was liable for an injury to one who was riding on the gondolas, caused by negligence in the construction, operation and management thereof.

The duty which is incident to the ownership of premises imposes an obligation not only that the proprietor shall not so use them, or create such conditions thereon that danger to others will result, but that he shall not permit third persons so to use them as to create such conditions thereon. *Boston Beef Packing Co. v. Stevens*, 12 Fed. 279; *Bohier v. Dienhart Harness Co.*, 19 Ind. App. 489; *Kelly v. Cohoes Knitting Co.*, 8 N. Y. App. Div. 156. Where a person owes a duty with reference to the safety of premises, structures, or appliances, he cannot excuse himself from performance by showing

a contract with third parties to keep the premises in repair, or a duty on someone else as well to do so. *Boston v. Coon,* 175 Mass. 283; *King v. Heib,* 9 Ohio Cir. Dec. 797; *Steppe v. Alter,* 48 La. Ann. 363. English decisions support this doctrine. *Marney v. Scott,* 68 L. J. O. B. 736; *Wettor v. Dunk,* 4 F. & F. 298. Dominion over or control of articles or premises is, in general, sufficient to raise a duty that they shall not be so used or employed as to be likely to injure others. This rule is supported inferentially by *Hollard v. N. Y.,* 16 Daly, 124, and directly by *Empire Laundry Machine Co. v. Brady,* 164 Ill. 58.